To be Argued by:
DEBRA J. GUZOV

New York County Clerk's Index No. 157316/14

New York Supreme Court
Appellate Division – First Department

J. ARMAND MUSEY,

Plaintiff-Appellant-Respondent,

– against –

425 EAST 86 APARTMENTS CORP.,

Defendant-Respondent-Appellant,

– and –

DOUGLAS ELLIMAN PROPERTY MANAGEMENT, FRANK CHANEY, PATRICIA CARBON, DAVID MUNVES, MICHAEL CONSIDINE, SUZANNE KEANE a/k/a SUZANNE JULIG, JENNIFER KRUEGER, GEORGE GREENBERG, ALEXANDER SHAPIRO and LESLIE SPITALNICK,

Defendants-Respondents.

REPLY BRIEF FOR PLAINTIFF-APPELLANT-RESPONDENT J. ARMAND MUSEY

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PRELIMINARY STATEMENT

Plaintiff-Appellant-Cross-Respondent J. Armand Musey ("Appellant"), by and through his counsel, Guzov, LLC, respectfully submits his Reply Brief in further support of his joint appeal from the Decisions.[1] Try as it might, Respondent[2] cannot reconcile the Decisions with the requirements of applicable law.

Respondent's opposition brief is notable for the central issues it does not argue. In its opposing brief, Respondent appears to reverse course and acknowledge what it has long denied in its e-mails, (R. 311), briefs, (R. 575), affidavits, (R. 139, 204) and oral arguments, (R. 661, 663-4, 666), before Supreme Court. Appellant's Proprietary Lease grants him exclusive (and actual) use of the Roof/Terrace. However, Respondent is now trying to chip away at Appellant's rights so that the right to "exclusive use" is stripped of any meaning, including the right to enjoy, occupy and even physically access part of the Unit. This position is patently wrong under the lease and under the law. Due to the current concession on Respondent's part, the history of conflicting positions taken in the past by

[1] Capitalized terms in this Reply Brief are used as defined in Appellant's Brief dated March 20, 2017 (the "Brief.") References to the Record on Appeal will be in the form "R. __." References to the Brief for Respondent will be in the form "Resp. Brief at __".

[2] Although Appellant only took an appeal on claims against Respondent 425 East 86 Apartments Corp., ("Respondent"), multiple dismissed-Defendants joined the brief as "Defendant-Respondents". Appellant will refer to the singular "Respondent" throughout this brief.

Respondent and the consequent error in the lower court[3], Appellant respectfully requests that this Court reverse those portions of the Decisions on this point.

Respondent tries to re-cast Appellant's claims as mere reluctance to pay for a cover. This mischaracterization is intentional, obscuring the fact that Respondent has consistently:

i. Denied Appellant the right to an accessible and habitable Roof/Terrace – something he is entitled to under the Proprietary Lease and under the law; and

ii. Improperly attempted to extract broad, overreaching and prohibitive indemnities and roof maintenance responsibilities, far beyond the minor cost shifting Respondent describes in its opposing brief.

Respondent's arguments with respect to the statute of limitations issues are similarly unavailing. In an attempt to keep this case under the auspices of Article 78, Respondent focuses almost exclusively on the "House Rule" aspects of this case. In doing so, Respondent, like the court below, ignores the substance of Appellant's contractual claims, which are subject to a six (6) year statute of limitations. Should this Court accept Respondent's arguments, it would categorically shorten all lessees' time to seek redress for breaches of their

[3] Supreme Court ruled that "[t]he issue of exclusivity of use of the terrace is unsettled," (R. 20), based on Respondent's statements. R. 14.

proprietary leases to one-hundred twenty (120) days, so long as the cooperative in question simply refers to its decisions as “rules,” even if, like here, the “rules” apply to only one person. Taken to its logical conclusion, a shareholder would be precluded from bringing any claim whatsoever after four (4) months from any corporate act or decision.

Respondent’s opposing brief provides no valid rebuttal of Appellant’s timeliness argument under Article 78. Instead, Respondent distorts the Record to avoid the only reasonable view of the facts: the Roof/Terrace Rules were formally passed and made final in 2014, not 2013. The Record demonstrates that, by Respondent’s Board’s own admission and representations, these “rules” were merely proposals under discussion and not final, formal rules until July, 2014.

Alternatively, should the Roof/Terrace Rules be deemed to have been final in 2013, in the year following their circulation, Appellant was exhausting his administrative recourse in accordance with Respondent’s affirmative guidance and the required analysis set forth by the Court of Appeals.

Lastly, Respondent is plainly wrong in arguing that the implied warranty of habitability and right of quiet enjoyment do not apply to outdoor areas or terraces. There is controlling New York law that holds to the contrary. Moreover, the definition of Appellant’s Unit in the Proprietary Lease’s first page explicitly includes the outdoor areas in question.

POINT I

IT IS NOT, AND CANNOT BE, DISPUTED THAT APPELLANT HAS THE RIGHT TO EXCLUSIVE, ACTUAL USE OF THE ROOF TERRACE UNDER THE LAW AND PROPRIETARY LEASE

Appellant has the undisputed contractual right to exclusive use of the Roof/Terrace, as it is part of his Unit as defined on the first page of the Proprietary Lease. R. 83. Even Respondent's long-time attorney, Herb Cohen wrote, "[u]nquestionably, the [Roof/Terrace] is part of Musey's [Unit] and unquestionably he has the exclusive right to occupy it." R. 283. The Second Department recently ruled unanimously in a shareholder's favor on this exact issue.[4] To accept Respondent's argument that this right does not encompass the right to actually use, enjoy or even access the space, would render the right to "exclusive use" and "tenancy" meaningless.

A. Appellant Did Not Waive His Rights to the Roof/Terrace

In its brief, Respondent makes the rather absurd argument that because the Roof/Terrace was cordoned off, under construction and completely covered at the time of purchase, and Appellant was not able to enter the site to visually inspect the area, Appellant somehow agreed to give up rights to meaningful use of the space.

[4] In *Goldhirsch v. St. George Tower & Grill Owners Corp.*, 142 A.D.3d 1044, 1046 (2d Dep't 2016), the Second Department unanimously found the terrace was part of the apartment as defined in the lease. That lease had identical, relevant terms to Appellant's lease.

Of course, Appellant had every right to reasonably rely upon the Proprietary Lease, the prior inspection reports, and the prior proprietary lessee's documented use of the Unit's Roof/Terrace, as well as Respondent's assurances that Appellant would have a "lovely new terrace" to enjoy. R. 224, 299. Respondent argues that the boilerplate contract language stating that Appellant would take the premises "as is" serves as some kind of waiver of his rights. Resp. Br. 7. This position is wholly unsupported by fact or law, and cannot be countenanced.

As discussed in Appellant's initial brief, his right to exclusive use is clear from the Proprietary Lease and supporting documentary record. R. 83.

B. *Shapiro* Is the Controlling Interpretation of Identical Contract Provisions

This Court, in *Shapiro v. 350 E. 78th Street Tenants Corp.*, 85 A.D.3d 601 (1st Dep't 2011), held that the defendant was required to repair the plaintiff's terrace and return it to a usable condition pursuant to a proprietary lease identical to Appellant's lease in all relevant provisions. *Id.* at 603. R. 89-90. As pointed out in Appellant's opening brief, Supreme Court incorrectly tried to distinguish *Shapiro* on the mistaken basis that the *Shapiro* lease did not contain a provision stating that the lease was "subject to" subsequently passed Roof/Terrace Rules when, in fact, it did. R. 88, 366.

In its opposing brief, Respondent has not attempted to, and cannot, refute this fact. Instead, Respondent attempts to distinguish *Shapiro* on the unavailing

(and incorrect) ground that the *Shapiro* decision turned on the fact that the *Shapiro* plaintiff had a history of personally using the terrace. This is a meaningless distinction. The *Shapiro* decision rightly focused upon the plaintiff's rights under the Proprietary Lease and not her past use.

> Supreme Court properly concluded that defendant's failure to maintain the roof deprived plaintiff of [her] use, in violation of the offering plan and proprietary lease (*see Dinicu v Groff Studios Corp*., 257 A.D.2d 218, 224 (1st Dep't 1999); *Washburn v 166 E. 96th St. Owners Corp*., 166 A.D.2d 272 (1st Dep't 1990)), warranting injunctive relief directing repairs necessary to render the roof amenable to plaintiff's right of use under the offering plan and proprietary lease, subject to reasonable regulation by defendant (see *Benedict v International Banking Corp.*, 88 A.D. 488 (1st Dep't 1903))… the injunctive order merely directs defendant to make such repairs as may be necessary to restore plaintiff's use of the roof, consistent only with the rights granted to her as the owner of the shares allocated to the penthouse apartment.

Shapiro, 85 A.D.3d at 602-3.

1. The Prior Proprietary Lessee of the Unit Did in Fact Use the Roof/Terrace

The prior proprietary lessee's use (or lack thereof) of the Roof/Terrace should have no bearing on Appellant's right to quiet enjoyment of a usable Roof/Terrace under Paragraphs 10 and 14 of the Proprietary Lease. R. 89-90. However, Respondent tries to make use of the fact that Appellant has not, himself, used the Roof/Terrace, (Resp. Br. 35-6), which is ironic, considering the fact that Respondent, itself, stopped him from doing so: first due to Respondent's own construction project that continued until the day the first version of the

Roof/Terrace Rules were distributed[5], and later due to a direct instruction issued by the Board. R. 280. Even if prior use was relevant, the Record is replete with evidence that Appellant relied upon the fact that the Roof/Terrace was indeed used by the prior proprietary lessee. Appellant was on notice that his predecessor made substantial use of the Roof/Terrace for several years as shown by photographic evidence, (R. 389, 399, 403), prior inspection reports, (R. 321-322), and independent press accounts.[6] Additionally, there are other facts corroborating the mutual expectation that Appellant would access and occupy the Roof/Terrace area.[7]

If the Court finds prior use to be relevant, at minimum, Appellant deserves the right to discovery on this issue.

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[5] The construction company was owned by the brother-in-law of the board chairman Frank Chaney. R 413-419.

[6] In its Opposition, Respondent tries weakly to avoid making a direct misrepresentation that the prior proprietary lessee did not use the Roof/Terrace, as it must be fully aware that she did, in fact, use it. Resp. Br. 35. Instead, Respondent focuses on the admissibility of the various photographs, press reports and third-party accounts. This is a distraction, and admissibility can and would be established if given the opportunity. Further admissibility need not be demonstrated when describing what facts Appellant relied upon. Also, Respondent tries to make a tricky argument that the photos in the Record taken by Appellant cannot serve as evidence of the prior owner's use because the photos were taken after the roof membrane was replaced. Resp. Br. 35, n.8. Those photographs, however, are offered to show the existence of well-worn steps outside (R. 403) and the extensive awning on the Roof/Terrace that can only be operated from the exterior (R. 398, 399) as additional evidence that Appellant's predecessor did in fact use the Roof/Terrace.

[7] Respondent's approval of Appellant installing an additional door leading to the Roof/Terrace area and an air conditioning compressor only accessible from the Roof/Terrace also evidences such intent. R.227, 228, 650. Further, the original "House Rules" appended to the Proprietary Lease, specifically Rule 28, clearly contemplates Appellant's use of the Roof/Terrace. It contains specific regulations related to installation of plantings. R. 118.

2. Respondent Is Responsible for Providing a Usable Roof Terrace, as in *Shapiro*

Respondent also attempts to distinguish *Shapiro* on the spurious grounds that, because Respondent is attempting to force the responsibility of restoring the Roof/Terrace area to usable condition on Appellant/Shareholder, a responsibility *Shapiro* places squarely on the cooperative, *Shapiro* does not apply. Shapiro applies precisely because it holds the cooperative responsible for making the Roof/Terrace area usable under the Proprietary Lease.

Respondent also trivializes Appellant's impediments to use of the Roof/Terrace. Appellant cannot simply "cover" it to use it. Not only has Respondent not provided the indemnification agreement for him to sign, it has not disclosed the specific requirements of any potential overburden, a warranty, or other processes it would require Appellant to follow. Respondent has opposed Appellant's subpoena of the roofing company seeking this information, (which company is owned by the brother-in-law of a former board president and current board member, (R. 394-5), as the Board has informed Appellant that the Roof/Terrace can no longer withstand normal residential usage in accordance with Respondent's Certificate of Occupancy. R. 429. Currently Appellant has no viable path to accessing the Roof/Terrace. Moreover, the Roof/Terrace Rules require him to absorb enormous amounts of open-ended maintenance and indemnification liability effectively prohibiting his use. In any event, this Court ruled in *Shapiro*

that the cooperative bore the responsibility for making the terrace habitable, not the shareholder/tenant. This is clearly a breach of the Proprietary Lease's guarantee of quiet enjoyment in Paragraph 10, (R. 89), and the right to use the entire Unit as a private dwelling as pursuant to Paragraph 14. R. 90.[8]

Accordingly, Supreme Court's attempt to distinguish *Shapiro* must be wholly disregarded.

C. The House Rules Cannot Gut Appellant's Contractual Rights

Supreme Court implied that because the Proprietary Lease and Roof/Terrace Rules were intertwined, Respondent could not be held in breach of the Proprietary Lease. R. 39. Such a sweeping interpretation would insulate cooperatives from liability so long as a cooperative labels its actions a "rule," even if this "rule" applied exclusively to one party. Supreme Court wrongly concluded:

> [T]he House Rules are expressly incorporated into the lease, and the lease terms are expressly made 'subject to' those Rules (see Lease § 7, 13). Together, the lease and the House Rules operate to contractually obligate Musey, as a penthouse apartment lessee, to pay for the renovation of the roof space into a terrace space usable as an entertainment area. R. 39.

Appellant has never objected to the fact that any overburden, decking or other materials he may wish to install would be done at his own expense and risk.

[8] In *Goldhirsch*, the Second Department unanimously issued a similar opinion in a matter with a lease having nearly identical relevant language and also ruled that the terrace was part of "the apartment" under the lease. *Goldhirsch,* 142 A.D.3d at 1046.

However, it is the wrongful attempt to shift major responsibility for the integrity of the entire roofing system, the underlying roofing system maintenance, and nearly complete indemnification of the building for areas outside his control, as a newly-added condition of tenancy, to which Appellant has objected. R. 195-8.

It is immaterial that Respondent's vehicle for attempting to further eliminate Appellant's contractual rights was a "house rule" that affected and targeted him exclusively. R. 315-8. Even if the Proprietary Lease explicitly references the possible future passage of amended rules: i) those rules must be "reasonable" (*Rosenthal v. One Hudson Park, Inc*., 269 A.D.2d 144, 145 (2000)); and ii) the rules cannot deprive the shareholder of his fundamental benefit of the bargain including rights under the Proprietary Lease. *See Kaplan v. Park South Tenants Corp.*, No. 157669/2013, 2014 WL 1092445 (Sup. Ct. N.Y. Co. March 18, 2014).

POINT II

APPELLANT MUST BE PROVIDED WITH A HABITABLE AND ACCESSIBLE TERRACE UNDER RPL 235-B(1)

Real Property Law Section 235-b(1) provides that the purpose of the implied warranty of habitability is to ensure the premises are reasonably suited for their intended purposes. *Park West Management Corp. v. Mitchell*, 47 N.Y.2d 316, 325 (1979); *See also Solow v. Wellner*, 86 N.Y.2d 582, 587-588 (1995) ("A breach of warranty may be said to have occurred where the premises have not met the

reasonable expectations of the parties"). Respondent argues that the implied warranty of habitability does not extend to terraces and in doing so, cites the *Solow* case in support of this argument. Resp. Br. at 54. However, this is a restriction not contained in *Solow*, and not interpreted by subsequent courts. *See e.g. Goldhirsch*, 142 A.D.3d at 1045-6 (*Solow* facts apply to usability of a terrace). Here, Respondent disregards this obligation, and disclaims all obligations regarding the Roof/Terrace, in violation of the Proprietary Lease and New York law.

In support of its position, Respondent cites *Jackson v. Westminster House Owners Inc.*, No. 115879/01, 2004 WL 5487453 (Sup. Ct. N.Y. Co. April 8, 2004). This case is entirely inapposite and provides no support to Respondent's position. In *Jackson*, the Court held that the cooperative did not breach the implied warranty of habitability during the seven (7) month period during which repairs were made to the terrace, with the consent of the shareholder. *Id.* In the instant case, Appellant does not address his complaint to the period of time the Roof/Terrace area was under construction, which ended July 27, 2013. Rather, Appellant complains that Respondent conducted "repairs" that subsequently left a large part of his home inaccessible, not habitable, and unfit for any use that was reasonably foreseen by both parties.

A. Persuasive Authority from the Second Department Is Instructive on Warranty of Habitability of Terraces

In *Goldhirsch, supra*, the Second Department unanimously awarded damages based on a breach of the implied warranty of habitability and breach of the proprietary lease, on summary judgment, when a cooperative's repairs to a terrace left it unusable for several years. It also granted the shareholder summary judgment on the claim for breach of the implied warranty of habitability. The Second Department noted:

> In *Solow v. Wellner*, the Court of Appeals clarified that Real Property Law § 235-b(1) includes three separate covenants: "(1) that the premises are fit for human habitation, (2) that the premises are fit for the uses reasonably intended by the parties, and (3) that the occupants will not be subjected to conditions that are dangerous, hazardous or detrimental to their life, health or safety" (*Id.* at 587- 588 [internal quotation marks omitted]). "A breach of warranty may be said to have occurred where the premises have not met the reasonable expectations of the parties" (7-82 Warren's Weed New York Real Property § 82.22 (2016)).

Id. at 1046.

A surface capable of withstanding the pressures of walking and standing is clearly necessary for human habitation and occupancy. Further, the intended purpose for a terrace (or any leased premises) is, at minimum, is to be accessed and occupied by the lessee. Access and occupancy similarly require a trafficable surface – even more so than properly functioning elevators are required to access

high rise apartments, in accordance with *Solow*. *Solow*, 86 N.Y.2d at 587-588. Respondent clearly foresaw such use when its then-Board President indicated:

> How one might 'normally' or 'reasonably' use a roof covers a wide range of possibilities. I think most people would say that the normal, reasonable use of a roof terrace adjacent to a penthouse apartment would include some or all of the following: decking, furniture, planters.

R. 406.

Respondent clearly breached two of the three covenants of the implied warranty of habitability. Respondent argues Appellant's safety-related claims "are a red herring." This is belied by photographic evidence in the record, (R. 288-291), and Respondent's own e-mail. R. 297. As such, the third covenant, the existence of dangerous condition, is still in factual dispute and Appellant is due, at minimum, discovery on this issue.

B. Appellant Does Claim that the Roof/Terrace Is Structurally Compromised

Respondent incorrectly asserts "[t]here is no contention by Appellant here that the roof space immediately outside the [Unit] is not structurally sound." (Resp. Br. p. 35). This is incorrect. Appellant has been told by Respondent repeatedly that the Roof/Terrace area cannot withstand even the pressure of walking or standing, (R. 280), much less the normal residential use indicated by the Certificate of Occupancy, (R. 429), or normal expected use. Additionally, David Munves, the

former Respondent's Board Treasurer and current Board President, admits to structural concerns. He states:

> I visited Mr. Musey and Ms. Janicek in PH A over the weekend. They took the opportunity to point out several building/*structural* [emphasis added] items that should be investigated and addressed as required. From memory, these are as follows: When it rains, water pools on parts of the terrace, i.e., it doesn't drain off as it probably should Some parts of the old metal railing that serve to increase the height of the parapet wall from 36" to 42" are missing or loose; There's a metal screen that helps separate the terraces for PH A from PH B. It's quite rusted and doesn't appear to be well secured…

R. 297.

At a minimum, Appellant is entitled to discovery to determine the precise nature of these structural issues and Supreme Court erred in dismissing Appellant's Breach of the implied warranty of habitability claim prematurely.

POINT III

A BREACH OF THE PROPRIETARY LEASE IS A BREACH OF CONTRACT, AND THEREFORE, SUBJECT TO A SIX (6) YEAR STATUTE OF LIMITATIONS

A. The Proprietary Lease Is a Private Contract the Breach of Which Can Only Be Remedied in a Plenary Action

As discussed in Appellant's initial appellate brief, Article 78 review is a limited review not suited to resolving breach of contract claims. CPLR § 7803 confines review to whether "a determination was made in violation of a lawful procedure, was affected by an error of law or was arbitrary and capricious or an

abuse of discretion." This is not the standard for breach of contract. Breaching a contract can be a rational decision, but as previously argued, the breaching party is not absolved of the responsibilities attendant to that breach. Respondent does not dispute this argument.

Moreover, once a proprietary lease is signed, it becomes a private contract, and is not a governing document of the corporation. Therefore, a violation of its terms is not reviewable in an Article 78 proceeding. *Estate of Del Terzo v. 33 Fifth Avenue Owners Corp.,* 136 A.D.3d 486 (1st Dep't 2016) (claims for breach of a proprietary lease are to be treated as breach of contract with a six year statute of limitations); *Villanova Est., Inc. v. Fieldston Prop. Owners Ass'n, Inc.,* 23 A.D.3d 160, 162 (1st Dep't 2005) (claims sounding in contract were properly brought in a plenary action and thus subject to the six year statute of limitations, but a claim challenging compliance with a Bylaw should have been brought under Article 78).

Also, a proprietary lease for a cooperative apartment is "not only an indicia of ownership of the apartment but is also a contract, enforceable under general rules of New York contract law." *Matter of Chapman v. 2 King St. Apts. Corp.,* 8 Misc.3d 1026(A) (Sup. Ct. N.Y. Co. Aug. 12, 2005). Logically, all cooperative breaches flow, in some manner, from board decisions. This is not a valid reason to shorten the statute of limitations to one hundred twenty (120) days. Supreme Court erred in holding that Appellant's breach of contract claim should have been

brought as an Article 78 proceeding, or at least allowing Appellant discovery and a hearing on the dispute of facts in the matter.[9]

B. Roof/Terrace Rules Violate Proprietary Lease

In an attempt to confuse the issues, Respondent claims that the Roof/Terrace Rules do not violate any provisions of the Proprietary Lease and so any challenge to the "rules" must be under Article 78. In support of this untenable position, Respondent argues that because its governing documents do not state that it is responsible for maintaining any portion of the roof above the roof membrane, it is not responsible to provide Appellant with a usable Roof/Terrace. Resp. Br. 40. Consequently, it argues, Appellant's challenge to the attempt to force broad maintenance obligations[10] and significant and potentially crippling liability

[9] Respondent tries to argue that Appellant failed to raise his statute of limitations argument before the trial court, because he focused on contract not "property" rights. R. 607-608. This is nonsensical. His property rights are intertwined with his contract rights, in that Respondent violated the terms of the Proprietary Lease in adopting the Roof/Terrace Rules. Appellant's memorandum of law submitted in opposition to Respondent's motion to dismiss is replete with references to his property rights. R. 526-7, 528, 532-533, 540-3, 543-5. Indeed, that memorandum also includes an argument section addressing Appellant's right to exclusive use of the Roof/Terrace. R. 540-3. Accordingly, Appellant has always maintained that the statute of limitations applicable to his causes of action is six years.

[10] Appellant would not have expended the resources to litigate this issue had the new maintenance requirements in the Roof/Terrace Rules been limited to incidental/minor maintenance such as cleaning, painting, etc. and/or maintenance of any future improvements the Appellant or his successors might make (with Respondent Board's approval). The heart of this dispute on this matter is the unbounded scope of the maintenance requirements. They could easily be interpreted to include major repairs to the parapets, exterior walls, roofing sub-substructures, and even the elevator mechanicals, all of which are "in the Roof/Terrace area" Respondent seeks to require Appellant to "maintain."

exposure[11] on Appellant, is not a challenge sounding in breach of contract. This twisted logic must be disregarded.

Paragraph 2 of the Proprietary Lease clearly requires Respondent to maintain the entire building with the exception of those items listed in Paragraph 18, which are the Appellant's responsibility.[12] Paragraph 18 clearly confines Appellant's maintenance responsibility to certain categories of items in the interior areas of the Unit. Additionally, because it is by definition part of the Unit, the Proprietary Lease unequivocally requires Respondent to provide Appellant with a habitable Roof/Terrace that he can access and use. Supreme Court committed reversible error in failing to acknowledge these breaches, or at minimum, allow Appellant discovery on them.

[11] Paragraph 11 of the Proprietary Lease currently provides Appellant is responsible for damage "due wholly or in part to any act, default, or omission of the Lessee or any person dwelling or visiting in the apartment…" R. 89. Appellant has no objection to this existing standard of liability to which he expressly agreed. Appellant objects to newly added liability for "indirect damage," particularly on a pre-war building's roofing system that has been repaired to such questionable standards it can no longer even support the walking needed to access it. Appellant cannot, for example, accept responsibility for damage resulting from a latent structural flaw that fails in the course of ordinary usage. Respondent's Roof/Terrace Rules would hold him responsible for such damage and materially increase his proportional cash requirements in violation of Paragraph 6 of the Proprietary Lease. R. 87-88.

[12] Not only does Respondent have to maintain these areas, but must maintain them to the standard of "a first class apartment building." R. 85.

C. There Is No Authority for Applying Article 78 to Rules that are in Violation of a Proprietary Lease

Tellingly, Respondent does not and cannot provide any authority where Article 78 applies to enacted rules or board actions resulting in a breach of the Proprietary Lease. Nowhere can they find support for the proposition that actions based upon breaches of the Proprietary Lease are subject to a four month statute of limitations. Respondent cites three cases which, upon review, provide no support for this position. First, in *Matter of Dobbins v. Riverview Equities Corp.*, 64 A.D.3d 404 (1st Dep't 2009), this Court merely upheld the trial court determination that an assessment approved at a special meeting of the shareholders is a board action which must be challenged in an Article 78 proceeding. Second, in *Herriot v. 206 West 121st Street*, No. 153764/2016, 2017 WL 446901 (Sup. Ct. N.Y. Co. Feb. 2, 2017) and *Valyrakis v. 346 West 48th Street Housing Dev. Fund Corp.*, No. 152111/16, 2016 WL 6070818 (Sup. Ct. N.Y. Co. Oct. 13, 2016), the courts held that any allegations the cooperative made exceeded its authority under the building's governing documents and must be brought in an Article 78 proceeding.

POINT IV

APPELLANT SATISFIED THE FOUR MONTH STATUTE OF LIMITATIONS FOR ARTICLE 78 PROCEEDINGS

A. The Roof/Terrace Rules Were Finalized in July 2014 and Appellant Commenced an Action Within Six Weeks Thereafter

Faced with the realization that Appellant's claim was timely commenced – even under an Article 78 analysis – Respondent assumes the untenable position that the Roof/Terrace Rules were finalized in July 2013. The Record belies this argument as all relevant documents demonstrate that the rules were under consideration and the subject of discussion in July 2013, but certainly had not been finalized or adopted. The examples highlighting the lack of finality are legion. Most compellingly, on September 13, 2013, Respondent wrote an email to Appellant and specifically stated "Our next board meeting is Tuesday, Sept 17th…At that same meeting the board could possibly modify or clarify the [Roof/Terrace Rules], as we deem appropriate." R. 295. Thereafter on January 10, 2014, Respondent welcomed a meeting with Appellant to come up with "practical, mutually acceptable ways to address" Appellant's concerns about the Roof/Terrace Rules. R. 273. Respondent made statements repeatedly suggesting meetings, inviting comments, promising further changes to the proposed rules and confirming that the proposed rules were subject to discussion. The facts directly contradict Respondent's claim that the rules were "final" in July 2013 in

correspondence dated February 25, 2014, March 5, 2014, and April 1, 2014. R. 283-5, 293, 311-314. Try as it might, Respondent cannot escape its written words.

Not content with trying to hide from its own words, Respondent argues that Appellant's withdrawal of his Roof/Terrace alteration plan (Resp.'s Br. 22) is a concession that the Roof/Terrace Rules were final. Indeed, the Record demonstrates that Respondent's decision was a reaction to the reality that, notwithstanding representations to the contrary, when the construction equipment and tarps were removed from Appellant's Roof/Terrace, he realized that the area he intended to improve was so compromised it could not even support the foot traffic required for access. Moreover, rain pooled on the Roof/Terrace. R. 297. Appellant could not improve his Roof/Terrace when its very foundation was fraught with defects for which Respondent is responsible. Likewise, Appellant's December 13, 2013 email: "[i]f the Board['s] …position is unchanged on these issues, we don't have anything to discuss" is not an admission of finality when all indications are that the parties agreed to – and did – continue to meet because the Roof/Terrace Rules were not final.

Furthermore, it is black letter administrative law that the finality of a rule must be published to permit those who object the right to invoke administrative remedies necessary to revoke or modify the rule. Respondent does not – and cannot – show it ever published the Roof/Terrace Rules to the entirety of the

shareholders as marked "final."[13] R. 228, 234. In fact, the Roof/Terrace Rules were never circulated to the shareholders at large. The Court of Appeals unanimously ruled that any ambiguity regarding a rule must be construed against the administrative body: in this case the Board. *Castaways Motel v. Schuyler,* 24 N.Y.2d 120 (1969).[14] Moreover, construing the issue of finality in the light most favorable to Appellant, at best there is an issue of fact raised regarding finality which should have required discovery. *George v. N.Y. City Transit Auth.,* 306 A.D.2d 160, 161 (1st Dep't 2003). Supreme Court's determination of that the Roof/Terrace Rules were final as of July 2013, on facts presented without an order of limited discovery, is also basis for reversal of Supreme Court's order. *See Matter of Seniors for Safety v. New York City Dept. of Transp.,* 101 A.D.3d 1029,

[13] The Roof/Terrace Rules have not been enforced against the only other person to whom they apply, longtime board member George Greenberg. Mr. Greenberg has been allowed to keep: i) Plants over 72" (violation of standard 11.f); ii) Plants closer than 6" from parapet walls (violation of standard 11.h); 3) Planters attached/resting on parapet walls (violation of standard 15); 4) Personal items stored on his terrace (violation of standard 16); 5) Trellises and a shed on his terrace (violation of standard 20); 6) A propane gar barbecue grill (violation of standard 22); 7) Fixed awnings (violation of standard 24); and 8) An automatic plant irrigation system (violation of standard 25). The record contains significant photographic evidence of these violation. R. 248-253. Curiously, many of Greenberg's violations – tall plants, fixed awning and trellises – are precisely the type of items that would most likely be at issue during "high wind events," Respondent's reason for enacting the Roof/Terrace Rules.

[14] "In drafting the section which is now the law [CPLR Section 217], every attempt was made to avoid putting a party or his counsel in a position of having to guess when a 'final and binding' determination had been made. The burden was put on the public body to make it clear what was or what was not its determination. In dealing with this dilatory defense the courts should resolve any ambiguity created by the public body against it in order to reach a determination on the merits and not deny a party his day in court." *Castaways Motel v. Schuyler,* 24 N.Y.2d 120, 126-7 (1969).

1031 (2d Dep't 2012) ("the Supreme Court erred in holding that the first cause of action was barred by the statute of limitations, without first conducting a factual hearing to resolve disputed issues of fact relating to that issue (*see* CPLR 7804 (h))").

B. Respondent Fails to Counter Appellant's Exhaustion of Remedies Argument

In response to Appellant's argument that, alternatively, even if the proposed rules circulated in July 23, 2013 constituted a definitive position of Respondent, (which they could not have as they were subsequently altered), Appellant still would not be time-barred because his claims would not have been ripe until July 8, 2014. R. 302. Respondent argues that Appellant was simply "requesting reconsideration." This argument (and the case law cited in support, Resp. Br at 24) is inapposite and is belied by the Record. Appellate could not have known until July 2014 that any other remedy was futile, especially because the Board instructed, invited, and advised Appellant to participate in the process to promulgate amended rules. R. 229-233, 269-70, 273-4, 286-7, 295, 302, 310. In *Walton v. N.Y. State Dept. of Correctional Servs.*, 8 N.Y.3d 186, 196 (2007), the Court of Appeals held that, "in deciding the point at which petitioner's administrative remedies are exhausted, courts must take a pragmatic approach and, when it is plain that 'resort to an administrative remedy would be futile' . . . an

Article 78 proceeding should be held ripe, and the statute of limitations will begin to run." (citations omitted). *Walton* compels the same result here.

C. Equitable Estoppel Bars Respondent from Asserting the Statute of Limitations as a Bar to Appellant's Claim

Unable to distinguish the cases that demonstrate that Respondent is equitably estopped from asserting a statute of limitations defense, Respondent attempts to turn the lack of finality of the Roof/Terrace Rule in 2013 on its head and argue that there was finality. Respondent cavalierly attempts to brush off all correspondence indicating the contrary as attempts simply to engage Appellant in conversations to discuss the rule in its final iteration. Resp. Br. 20-21. The principle of equitable estoppel addresses exactly the scenario presented by Appellant where a party is lured into a sense of complacency by settlement discussions and then told that his statute of limitations expired during such discussions. It is patently evident that Appellant engaged in discussions with Respondent because he was led to believe that the discussions would lead to the promulgation of a set of rules that would address his concerns as well as those of Respondent. At a minimum, therefore, Appellant is certainly entitled to discovery to investigate the reasons why Respondent continued to negotiate with him and advised him multiple times not to get his attorney involved during the process. R 229-33, 273, 311. *European American Bank v. Mr. Wemmick, Ltd. et al.,* 160 A.D.2d 905,906 (2d Dep't 1990); *North Coast Outfitters, Ltd. v. Darling,* 134

A.D.3d 998, 999 (2d Dep't 2015). So considered, the doctrine of estoppel precludes Respondent's statute of limitations defense and at a minimum requires limited discovery.

POINT V

LEAVE TO AMEND SHOULD HAVE BEEN GRANTED

Respondent relies broadly on Supreme Court's series of errors to conclude that Appellant should be precluded from amendment on the grounds of futility. Resp. Br. 56-61.

Respondent argues that Supreme Court properly denied the application because the proposed pleading was devoid of merit and legally insufficient. Resp. Br. 56-61. More specifically, it claims that three causes of action, sounding in breach of contract, declaratory relief and injunctive relief, were barred by the law of the case doctrine. Supreme Court did not address the merits of the proposed pleadings, but instead held that the law of the case doctrine dictates the denial of the application. As set forth in detail above, Supreme Court's determination that Roof/Terrace Rules can overrule integral provisions of the Proprietary Lease must be reversed. Upon reversal, there will be absolutely no basis to deny Appellant's application to amend his pleadings to plead the first three causes of action.

Appellant's fourth cause of action for breach of the implied warranty of habitability has merit. Respondent again incorrectly argues that Supreme Court

properly held that the implied warranty of habitability does not extend to terraces. As set forth in Point II above, this holding is clearly wrong and must be reversed. Moreover, recently a nearly identically-worded dismissal of a breach of implied warranty of habitability was unanimously overturned by the Second Department. *See Goldhirsch,* 142 A.D.3d at 1045-6. As a result of the foregoing, Supreme Court committed reversible error in denying Appellant's motion to amend his pleadings.

CONCLUSION

For the reasons set forth above, Appellant respectfully requests that this Court reverse the Decisions to the extent that they: i) improperly dismissed Appellant's third and fourth causes of action asserted in the Complaint; ii) improperly denied Appellant leave to amend the Complaint; and iii) improperly quashed two nonparty subpoenas.

Dated: New York, New York
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